become a rule of property, and as such must be upheld upon the doctrine of stare decisis, for the protection of vested rights."

See also, Parker *v.* Parker, 11 Cush. (New Hampshire) 519; Stull *v.* Veatch, 236 Ill. 207, 86 N. E. 227; Cohen *v.* Herbert, 205 Mo. 537, 104 S. W. 84; Ruef *v.* District Court (Mont.), 85 Pac. 866, 6 L. R. A., N. S., 617, with case note. And see lengthy note in 48 L. R. A. 130.

J. F. M.

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PULASKI ANTHRACITE COAL CO. *v.* GIBBONEY SAND BAR CO.

Nov. 18, 1909.

[66 S. E. 73.]

**1. Appeal and Error (§ 1064*)—Review—Harmless Error—Conflicting Instructions.**—The doctrine of harmless error is seldom, if ever, applied to conflicting instructions on a material point, because of the impossibility of saying by which the jury were guided.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

**2. Torts (§ 22*)—Joint Tort-Feasors—Persons Acting Independently.**—Where persons each separately operating a different coal mine, acting independently, put waste therefrom into a stream, some of which is carried by the water onto the land of another, one of them is not liable as a joint tort-feasor for the entire injury, however difficult it be to measure the damage caused by each.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 29; Dec. Dig. § 22.*]

Error to Circuit Court, Pulaski County.

Action by the Gibboney Sand Bar Company against the Pulaski Anthracite Coal Company. Judgment for plaintiff. Defendant brings error. Reversed and remanded for new trial.

*Phlegar & Powell* and *Longley & Jordan,* for plaintiff in error.
*W. B. Kegley* and *John L. Draper,* for defendant in error.

CARDWELL, J. The defendant in error brought this action against plaintiff in error, and recovered a verdict and judgment for $1,000 damages, alleged to have been sustained by the plaintiff by reason of the deposit of slack, slate, culm, and mine refuse in and along the banks of New river from the defendant's coal mine, which slack, etc., it is alleged was carried down the river and thrown upon the sand bar of the plaintiff, situated on

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*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

the east side of New river 3½ miles below the mine of the defendant.

The declaration claimed that the plaintiff owned the said sand bar; that it contained a large quantity of valuable marketable sand and gravel; that prior to and until January 26, 1906, it was selling therefrom large quantities of the sand and gravel, for which it was deriving a certain profit per cubic yard; and that the defendant, owning and operating its coal mine some 3½ miles above said sand bar, had placed prior to January, 1906, a large quantity of slack, slate, culm, and mine refuse in the river and along its bank, so that the same was carried down the river, some by the ordinary tides, and more by high water, and thrown upon said sand bar, and became mixed with the sand and gravel thereon, so as to render the sand worthless, etc.

At the trial of the cause, upon the issue joined on the plea of not guilty, it was developed that the land of which the sand bar was a part was conveyed to William Gibboney by a deed dated the 21st day of September, 1905, in consideration of $4,000, which was furnished him by one Frank Bell and others, who afterwards formed the plaintiff company, incorporated; that William Gibboney at once began shipping sand in his own name, but at the expense and for the benefit of the plaintiff corporation, and continued to do so until January 27, 1906, when he conveyed the land, including the sand bar, to this corporation, chartered the 4th day of January, 1906; that, after such conveyance, the business of selling and shipping sand and gravel for commercial purposes was carried on in the corporation's name, William Gibboney being in charge, and all the accounts of the transactions therefore had by William Gibboney acting for the prospective corporation were carried over to the accounts of the latter; that in January, 1906, and repeatedly thereafter, there were floods in New river which covered the sand bar, and each flood left more coal and other injurious properties in the sand than had previously been there; that the conformation of the river bed was such as tended to carry heavy matter from the western to the eastern side of the river; that the defendant and its predecessor in title to the coal mines now owned by it had placed considerable quantities of culm, slack, and mine refuse along and in the river, much of which had been carried away by high water; that coal mines have been operated for many years, one almost directly opposite defendant's mine, and but a few hundred feet from the river bank, and many others on Tom's creek and, Strouble's creek and their tributaries, on the east side of the river, and on Back creek on the west side of the river, all emptying into New river above defendant's mine; that the culm, slack, and mine refuse from these mines were placed or

washed into said streams and down them into New river; and that in 1904 the Virginia Anthracite Coal Company took charge of some mines on Strouble's creek and had opened and continued the largest mining operations of the 25 in all, including the defendant's mine, in that section, and that much of its culm, slack, and mine refuse had gone into the creek and been washed down into New river.

There were several exceptions to rulings at the trial on the introduction of evidence, but they are not relied on here, and only two questions are presented for decision, viz.: (1) Whether or not the plaintiff could recover in this action for damages done to the sand bar prior to the time it acquired the legal title thereto; and (2) whether, if the defendant's coal and other refuse from its mine and that of the other coal mines each contributed to the injury the plaintiff sues for, the defendant is liable only for such portion of the damages as its coal and other mine refuse did to the sand bar, or for all the damage done by the deposit in and upon the sand bar of coal and other refuse from all the mines which may have contributed to the injury.

With respect to the first question, we deem it only necessary to say that the evidence tended to prove that the damage to the sand bar prior to the acquisition of the legal title by the plaintiff was but a very small part of the injury complained of, and that whatever substantial injury the plaintiff sustained was done after it acquired the legal title to the sand bar. Therefore the defendant was but slightly, if at all, prejudiced by the rulings of the court on the introduction of evidence as to damages to the sand bar prior to that date.

It is very clear that the trial court in instructing the jury proceeded upon the theory that the defendant was a joint tortfeasor with others who, as the evidence tended to show, contributed to the pollution and injury of the plaintiff's sand bar, and responsible for the entire damage. Not only so, but contradictory instructions to the jury were given as to the defendant's liability to the plaintiff upon the facts which the evidence tended to establish, and which we have already stated.

Instruction No. 1, given for the plaintiff, told the jury that the defendant was liable for the whole damage done, if it "materially contributed" to the injury of the sand bar, although others also contributed; while, by plaintiff's instructions Nos. 4 and 5, the jury were told that the defendant was liable only for such proportion of the damage as was done by its refuse, and defendant's instruction No. 3, telling the jury that "the defendant is not liable for any damage which may have been done the plaintiff's sand bar from other mines than those operated by it, and, if the evidence shows that the sand bar was injured by matter from defendant's mines and other mines, the defendant is not liable for

any more of the damage than the evidence shows was done by the matter from its mines," was refused.

The learned counsel for the plaintiff concede that plaintiff's instructions Nos. 4 and 5 are in conflict with its instruction No. 1, but it is insisted that instruction No. 1 is a correct instruction, and therefore the defendant could not have been and was not prejudiced by the contradiction in the instructions; this contention being based upon the theory that the record shows that, if the jury were misled by the contradictory instructions, they were misled to the prejudice of the plaintiff, and not to the defendant, as evidenced by the amount of damages awarded the plaintiff.

In this view we cannot concur. The doctrine of harmless error is seldom, if ever, applied to conflicting instructions on a material point, for the all-sufficient reason that the court cannot say whether the jury were guided by the correct or the incorrect instructions. Va. & N. C. W. Co. *v.* Chalkley, 98 Va. 62, 34 S. E. 976; N. & W. Ry. Co. *v.* Mann, 99 Va. 180, 37 S. E. 849; Richmond Pass. & Power Co. *v.* Steger, 101 Va. 319, 43 S. E. 612; Amer. Tobacco Co. *v.* Polisco, 104 Va. 781, 52 S. E. 563; Southern Ry. Co. *v.* Hansbrough's Adm'x, 107 Va. 733, 60 S. E. 58; Norfolk Ry. & L. Co. *v.* Higgins, 108 Va. 324, 61 S. E. 766.

Moreover, we are of opinion that plaintiff's instruction No. 1 is an incorrect statement of the law of this case. No one can be required to answer in damages for the wrong of another with whom he was not in privity or concert, and whose action he could not control. This case comes within the purview of the line of authorities dealing with pollution of streams, the pollution causing damage to health or property, and, though there is seeming lack of harmony in the authorities, the unmistakable weight thereof is that where there are several concurrent negligent causes, the effect of which are separable, due to independent authors, neither being sufficient to produce the entire loss, then each of the several parties concerned is liable only for the injuries due to his negligence.

These principles are stated and the distinction dawn in 21 Am. & Eng. Ency. L., pp. 496-97, 719, citing a number of decided cases. On the last-named page, where the liability of a person contributing to a nuisance along with others is dealt with, it is said: "But if he acts independently, and not in concert with others, he is liable for damages which result from his own act only. And the fact that it is difficult to measure accurately the damage which was caused by the wrongful act of each contributor to the aggregate result does not affect the rule."

The doctrine is lucidly discussed in the well-considered case of Swain *v.* Tenn. Copper Co., 111 Tenn. 430, 78 S. W. 93, and the authorities reviewed at length; the result being that the doctrine we are contending for is unqualifiedly sanctioned. Among the

cases there cited is Dyer *v.* Hutchins, 87 Tenn. 198, 10 S. W. 194, where the plaintiff sued the several owners of a number of dogs which united in worrying and killing his sheep to hold them liable for the damage done his property, but it was held that each defendant was liable only for the injury done by his dog, and that a joint action could not be maintained, although it was impossible to tell the damage done by any particular dog.

The rule of law is stated in Jaggard on Torts, p. 797, as follows: "But the liability of joint contributors is not necessarily that of joint tort-feasors. If persons who maintain a nuisance act independently, and not in concert with others, each is liable for damages which result from his individual conduct only. And the fact that it may be difficult to actually measure the damages caused by the wrongful act of each contributor to the aggregate result does not affect the rule, or make any one liable for the acts of others." See, also, Gould on Waters, § 222; 14 Ency. Pl. & Pr. 1108; Chipman *v.* Palmer, 77 N. Y. 52, 33 Am. Rep. 566; Little Schuylkill, etc., Co. *v.* Richards, 57 Pa. 142, 98 Am. Dec. 209; Missouri *v.* Illinois, 200 U. S. 496, 26 Sup. Ct. 268, 50 L. Ed. 572.

The case of Little Schuylkill, etc., Co. *v.* Richards, *supra,* is directly in point, being an action brought against one of the parties contributing to a nuisance in filling up a milldam, resulting from throwing coal dirt into the river above it, by a number of parties acting independently of each other, to hold one of them liable for the entire injury. Held, that the defendant was liable for damages which resulted from his individual conduct only; and in conclusion the opinion says that to maintain the contrary doctrine "would be simply to say, because the plaintiff fails to prove the injury one man does him, he may therefore recover from that one all the injury that others do."

In Swain *v.* Tenn. Copper Co., *supra,* in speaking of the cases holding a contrary rule to that laid down in the principal case, the opinion says: "That there was in those cases either community of interest, concert of action, or common purpose or design, or joint, concurrent negligence, in some form, which made the defendants joint tort-feasors, and that, where carefully examined, they are not really in conflict with the doctrine here announced."

In the view that we take of this case, it becomes unnecessary to discuss other questions presented.

The judgment of the circuit court must be reversed and annulled, and the cause remanded to that court for a new trial to be had in accordance with the views expressed in this opinion.

Reversed.

**Note.**

This is a well considered case of first impression in Virginia, and the decision is well supported both by principle and authority. It will

be observed that the court does not apply this rule to injuries from concurrent negligent causes, due to independent authors, the effects of which are **inseparable**, for in such a case each tort feasor would be liable for the whole damage done. The distinction is well drawn in a note appended to this case in the March Number of the Harvard Law Review, vol. XXIII, p. 405, which we copy: Tort feasors are jointly and severally liable not only where they have acted in concert, or for a common purpose, but also where their originally independent acts have united to cause a single, inseparable injury. Slater *v.* Mersereau, 64 N. Y. 138; Barnes *v.* Masterson, 38 N. Y. App. Div. 612. It does not follow, however, that because it is very difficult to separate injuries into component parts, they form a single injury. Little Schuylkill Navigation, etc., Co. *v.* Richards's Adm'r, 57 Pa. St. 142. So even though an act, otherwise lawful, becomes a nuisance because other independent acts contribute, each tort feasor is liable only for his share. Harley *v.* Merrill Brick Co., 83 Ia. 73. It is true that equity will restrain all such independent tort feasors by a single bill analogous to a bill of peace. Lockwood Co. *v.* Lawrence, 77 Me. 297. See Pomeroy Eq. Juris., 3 ed., § 269. But one injunction merely prevents each defendant from doing what he has no right to do, whereas one judgment would exact payment for a wrong done by another. Blaisdell *v.* Stephens, 14 Nev. 17. In the principal case, each bit of the defendant's refuse harms a distinct bit of the plaintiff's sand-bar, though it is practically difficult to measure their combined extent. Swain *v.* Tennessee Copper Co., 111 Tenn. 430. But if his refuse united with that of the others to form a single injurious compound, a clear case of joint and several liability would be found.

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## BAUGHER *v.* HARMAN.

Nov. 18, 1909.

[66 S. E. 86.]

1. **Municipal Corporations (§ 705*)—Use of Street—Acts Constituting Negligence.**—Defendant and another were carefully driving an automobile on a crowded street at a speed of from four to six miles an hour, which was within the speed limit, and did not discover that a horse, which plaintiff and another were holding while it was being hitched, was frightened and shying at the automobile, until they were passing it and were about as near to it as the "width of the courtroom," and the horse did not become unmanageable until they had passed it. Defendant did not notice that one of the men at the horse motioned him to stop, and was not aware of plaintiff's danger until he was opposite to or had passed it; it having merely shied up to that time. Held, that defendant was not negligent in

*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.